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10/038,098	10/19/2001	Guy Goldstein	MERCURY.140A1	5353

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EXAMINER	
ALAM, UZMA	
ART UNIT	**PAPER NUMBER**
2157	

DATE MAILED: 03/28/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

E

Office Action Summary	Application No.	Applicant(s)	
	10/038,098	GOLDSTEIN ET AL.	
	Examiner	Art Unit	
	Uzma Alam	2157	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *16 December 2005*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-34* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☐ Claim(s) _____ is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

1. This action is responsive to the arguments filed on December 16, 2006. Claims 1-34 are pending. Claims 1-34 represent a method for monitoring response times on a network and a server.

Claim Rejections - 35 USC § 102

2. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> (e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

3. Claims 1-34 are rejected under 35 U.S.C. 102(e) as being anticipated by Curley et al. US Patent Publication No. 2002/0120727. Curley teaches the invention as claimed including a method for monitoring the performance of a network, a server, and a client (see abstract).

As per claim 1, Curley teaches the method for monitoring performance of a transactional server as seen by end-users of the transactional server, the method comprising:

executing a transaction between an agent running on a client computer at a remote end-ser location and a transactional server, wherein the transaction includes a sequence of uniform resource locator (URL) requests transmitted from the agent to the transactional server over a network (sending a request from a client to a server; (sending a TCP request from the client to the server, and measuring different parameters of time it takes to fulfill the request; paragraphs 0135-0138, 0146-0148);

measuring time durations between predefined events that occur during execution of the transaction, the measurements being made by the agent (timing different parameters of the network, the server, and the client by the software; paragraph 0151-0163, 0167-0168);

using the measured time durations to automatically calculate at least a network time representing an amount of time attributable to the network and a server time representing an amount of time attributable to the transactional server (measuring different parameters of time spent on the network and the server when a request is place; paragraph 0136, 0144, 0151-0163, 0167, 0168, also see the Table)

displaying a break down of time involved in completion of the transaction into multiple components, including at least said network time and said server time (generating a report on all measurements with breakdowns of each parameter; paragraph 0137).

As per claim 2, Curley teaches the method of claim 1 wherein measuring time durations between predefined events includes measuring a domain name system (DNS) lookup time (paragraph 0240).

As per claim 3, Curley teaches the method of claim 1, wherein measuring time durations between predefined events includes measuring a time required to establish an initial connection between the agent and the transactional server (initial server time; paragraph 0164, 0167, 0170-0715, 0195).

As per claim 4, Curley teaches the method of claim 1, wherein measuring time durations between predefined events includes measuring a time duration between the agent sending a first uniform resource locator (URL) request and receiving an acknowledgement from the transactional server for the first URL request (measuring time to receive first ACK; paragraph 0165, 0170-0175, 0195).

As per claim 5, Curley teaches the method of claim 1, wherein measuring time durations between predefined events includes measuring a time duration between the agent receiving an acknowledgement from the transactional server for the first URL request of the transaction and the agent receiving a first buffer of data (paragraph 0165, 0181-0189, 0201).

As per claim 6, Curley teaches the method of claim 1, wherein measuring time durations between predefined events includes measuring a time duration between the agent receiving a first buffer of data from the transactional server and the agent receiving a last buffer of data from the transactional server (paragraph 0181-0192).

As per claim 7, Curley teaches the method of claim 1 wherein measuring time durations between predefined events includes measuring a time spent by the agent processing the transaction on the client (paragraph 0178-0180).

As per claim 8, Curley teaches the method of claim 1 wherein displaying a break down of time includes displaying an amount of time spent in resolving a domain name for the

transactional server into an internet protocol address for the transactional server (paragraph 0240).

As per claim 9, Curley teaches the method of claim 1, wherein displaying a break down of time includes displaying an amount of time spent in establishing an initial connection between the client computer and the transactional server (paragraph 0014, 0017, 0028)

As per claim 10, Curley teaches the method of claim 1 wherein displaying a break down of time includes displaying an amount of time spent by the agent processing a transaction on the client computer (paragraph 0014, 0017-0028).

As per claim 11, Curley teaches the method of claim 1, wherein displaying a break down of time includes displaying at least one of the following: a DNS resolution time, a connection time, a client time, a server/network overlap time (paragraph 0014, 0017-0028, 0158-0161, 0240).

As per claim 12, Curley teaches the method of claim 1, further comprising:

executing the transaction from each of a plurality of geographically distributed locations (paragraph 0136, 0246-0256); and

displaying a break down of at least network time and server time for the transaction from each of the plurality of locations, whereby an administrative user of the transactional server may compare the network and server times for the transaction as seen by end users in each of the

plurality of locations (paragraph 0136, 0246-0256).

As per claim 13, Curley teaches a system for monitoring performance of a transactional server as seen from an end user location, the system comprising:

an agent component that communicates with the transactional server over a network to execute a transaction, and measures time periods between predefined events that occur during execution of the transaction (sending a TCP request from the client to the server, and measuring different parameters of time it takes to fulfill the request; paragraphs 0135-0138, 0146-0148; 0151-0163, 0167-0168); and

a report generation component that generates a transaction breakdown display based on the time periods measured by the agent component, the transaction breakdown display indicating a breakdown of a total transaction response time into multiple components (generating a report on all measurements with breakdowns of each parameter; paragraph 0137).

As per claim 14, Curley teaches the system of claim 13, wherein the multiple components include a network time representing an amount of said total transaction response time that is attributable to the network, and a server time representing an amount of said total transaction response time that is attributable to the transactional server (measuring different parameters of time spent on the network and the server when a request is place; paragraph 0136, 0144, 0151-0163, 0167, 0168, also see the Table).

As per claim 15, Curley teaches the system of claim 14 wherein the multiple components further include a client time (paragraph 0178-0180).

As per claim 16, Curley teaches the system of claim 15. Curley does not teach wherein the multiple components further include a connection time and a DNS resolution time (paragraph 0240).

As per claim 17, Curley teaches the system of claim 15 wherein the multiple components further include a server/network overlap time (paragraph 0228-0232).

As per claim 18, Curley teaches the system of claim 13, wherein the transaction comprises multiple uniform resource locator requests (paragraph 0139).

As per claim 19, Curley teaches system of claim 13, wherein the agent measures a time taken to establish an initial connection with the transactional server (paragraph 0164, 0167, 0170-0175, 0198).

As per claim 20, Curley teaches the system of claim 13, wherein the agent measures a time duration between the agent sending a first uniform resource locator (URL) request and receiving an acknowledgement from the transactional server for the first URL request (paragraph 0165, 0170-0175, 0195).

As per claim 21, Curley teaches the system of claim 13, wherein the agent measures a time duration between the agent receiving an acknowledgement from the transactional server for a first uniform resource locator (URL) request of the transaction and the agent receiving a first buffer of data (paragraph 0165, 0181-0189, 0201).

As per claim 22, Curley teaches the system of claim 13, wherein the agent measures a time duration between the agent receiving a first buffer of data from the transactional server and the agent receiving a last buffer of data from the transactional server (paragraph 0181-0192).

As per claim 23, Curley teaches the system of claim 13 wherein the agent measures a time spent by the agent processing the transaction on the client (paragraph 0178-0180).

As per claim 24, Curley discloses the system of claim 13 further comprising a component that analyzes data collected by the agent component to identify correlations in time between degradations in transaction response times and degradations in the components of such transaction response times, to thereby facilitate identification of causes of end user performance problems (paragraph 0133, 0140, 0163, 0215, 0232, 0252, 0256).

As per claim 25, Curley teaches the method for monitoring performance of a server system, the method comprising:

receiving data from a plurality of computers in a plurality of geographic locations indicating time spent by a server in processing transaction requests from each of the plurality of computers (0136, 0246-0251);

receiving data from the plurality of computers indicating time spent by a network in processing the transaction requests (timing different parameters of the network, the server, and the client by the software; paragraph 0136, 0144, 0151-0163, 0167-0168);

generating a report page with graphical representations of the time spent by the server and the time spent by the network for each of the plurality of geographic locations to facilitate a determination of whether network and server delays are location dependent ; wherein said time spent by the server and said time spent by the network are measure via agent software executed by said plurality of computers (generating a report on all measurements with breakdowns of each parameter; paragraph 0137, 0246-0252).

As per claim 26, Curley teaches the method of claim 25, further comprising receiving data from the plurality of computers indicative of, and displaying representations of, at least one of the following: client time, DNS resolution time, connection time, and server/network overlap time (paragraph 0014, 0017-0028, 0158-0161).

As per claim 27, Curley teaches the method of monitoring performance of a transactional server as seen from a remote user location, the method comprising:

executing a transaction between a client computer in the remote user location and the transactional server, wherein the transaction comprises a sequence of URL requests passed from

the client computer to the transactional server over a computer network (sending a TCP request from the client to the server, and measuring different parameters of time it takes to fulfill the request; paragraphs 0135-0138, 0146-0148; 0151-0163, 0167-0168);

on the client computer, measuring time durations between predefined events that occur during execution of the transaction (timing different parameters of the network, the server, and the client by the software; paragraph 0136, 0144, 0151-0163, 0167-0168); and

based on the time durations as measured by the client computer, breaking down a total execution time of the transaction into multiple components, including at least a network time and a server time (measuring different parameters of time spent on the network and the server when a request is place; paragraph 0136, 0144, 0151-0163, 0167, 0168, also see the Table)

As per claim 28, Curley teaches the method of claim 27, wherein the network time represents an amount of said total execution time that is attributable to the computer network and the server time represents an amount of said total execution time that is attributable to the transaction server (measuring different parameters of time spent on the network and the server when a request is place; paragraph 0136, 0144, 0151-0163, 0167, 0168, also see the Table).

As per claim 29, Curley teaches the method of claim 27 further comprising generating a display which graphically breaks down the total execution time of the transaction into multiple components (generating a report on all measurements with breakdowns of each parameter; paragraph 0137).

As per claim 30, Curley teaches the method of claim 27 further comprising calculating the network time by summing multiple constituent time durations measured on the client computer (paragraph 0163, 0215).

As per claim 31, Curley teaches the method of claim 27 wherein the method is performed by execution of agent software on the client computer (paragraph 0135-0138, 0146-0148).

As per claim 32, Curley teaches a computer readable medium having stored thereon a computer program which embodies the method of claim 27 (paragraph 0137)

As per claim 33, Curley teaches the method of claim 1 wherein using the measured time durations to calculate the network time and the server time comprises averaging measured time durations from multiple executions of the transaction, such that the network and server time represent averages (paragraph 0211-0212).

As per claim 34, Curley teaches the system of claim 13, wherein the transaction breakdown display indicates average time durations of each of the components (paragraph 0140, 0211, 0212).

Response to Arguments

4. The declaration under 37 CFR 1.132 filed December 16, 2006 is insufficient, and is given no weight, to overcome the rejection of claims 1-34 based upon 102(e) with Curley as set forth in

the last Office action because: the declaration filed does not comply with the MPEP 715.04 which states:

> (D) The assignee or other party in interest when it is not possible to produce the affidavit or declaration of the inventor. Ex parte Foster, 1903 C.D. 213, 105 O.G. 261 (Comm'r Pat. 1903). Affidavits or declarations to overcome a rejection of a claim or claims must be made by the inventor or inventors of the subject matter of the rejected claim(s), a party qualified under 37 CFR 1.42, 1.43, or 1.47, or the assignee or other party in interest when it is not possible to produce the affidavit or declaration of the inventor(s). Thus, where all of the named inventors of a pending application are not inventors of every claim of the application, any affidavit under 37 CFR 1.131 could be signed by only the inventor(s) of the subject matter of the rejected claims. Further, where it is shown that a joint inventor is deceased, refuses to sign, or is otherwise unavailable, the signatures of the remaining joint inventors are sufficient. However, the affidavit or declaration, even though signed by fewer than all the joint inventors, must show completion of the invention by all of the joint inventors of the subject matter of the claim(s) under rejection. In re Carlson, 79 F.2d900, 27 USPQ 400 (CCPA 1935).

5. In the declaration filed with the arguments on December 16, 2005, only one of the 4 inventors have signed the affidavit. The affidavit therefore is not being considered on its merits to overcome the rejection of claims 1-34.

6. After further review of the affidavit and attached exhibits, Examiner would like to note a few deficiencies. The listed deficiencies are merely a form of guidance and not a complete source of deficiencies to be overcome.

7. Firstly, Applicant is claiming a reduction to practice no later than June of 2000. The applicant, however, does not show evidence that the product worked, such as testing documents or signatures of customers to show that the product performed as stated before the said date. The documents provided do support conception, but do not support reduction to practice because diligence is lacking in the affidavit. For further guidance, MPEP 715.07 is entered below.

> Where conception occurs prior to the date of the reference, but reduction to practice is afterward, it is not enough merely to allege that applicant or patent owner had been diligent. Ex parte Hunter, 1889 C.D. 218, 49 O.G. 733 (Comm'r Pat. 1889). Rather, applicant must show evidence of facts establishing diligence. In determining the sufficiency of a 37 CFR 1.131 affidavit or declaration, diligence need not be considered unless conception of the invention prior to the effective date is clearly established, since diligence comes into question only after prior conception is established.
>
> Ex parte Kantor, 177 USPQ 455 (Bd. App. 1958).
>
> What is meant by diligence is brought out in Christie v. Seybold, 1893 C.D. 515, 64 O.G. 1650 (6th Cir. 1893). In patent law, an inventor is either diligent at a given time or he is not diligent; there are no degrees of diligence. An applicant may be diligent within the meaning of the patent law when he or she is doing nothing, if his or her lack of activity is excused. Note, however, that the record

> must set forth an explanation or excuse for the inactivity; the USPTO or courts will not speculate on possible explanations for delay or inactivity. See In re Nelson, 420 F.2d 1079, 164 USPQ 458 (CCPA 1970). Diligence must be judged on the basis of the particular facts in each case. See MPEP § 2138.06 for a detailed discussion of the diligence requirement for proving prior invention. Under 37 CFR 1.131, the critical period in which diligence must be shown begins just prior to the effective date of the reference or activity and ends with the date of a reduction to practice, either actual or constructive (i.e., filing a United States patent application). Note, therefore, that only diligence before reduction to practice is a material consideration. The "lapse of time between the completion or reduction to practice of an invention and the filing of an application thereon" is not relevant to an affidavit or declaration under 37 CFR 1.131. See Ex parte Merz, 75 USPQ 296 (Bd. App. 1947).

8. From this paragraph, it is understood, that the fact that the idea was conceived and released to the public is not sufficient to show that it worked and performed the same functions as the claimed in the present application. Further evidence must be provided to support reduction to practice.

9. Secondly, all exhibits and evidence provided must have a date associated with them. Exhibit B, the User Manual, does not show any date of publication.

10. Thirdly, the Applicant must clearly point out in the affidavit where the evidence shows the claimed invention. In the affidavit provided, Applicant points to how the specification of the

present application teaches the claimed invention, but fails to point out where in the supporting exhibits the claimed invention is taught.

11. Again, these deficiencies pointed out by the Examiner are for mere guidance and are not a comprehensive list of all possible deficiencies in the provided affidavit.

Conclusion

12. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Uzma Alam whose telephone number is (571) 272-3995. The examiner can normally be reached on Monday-Tuesday 5:30 AM - 2:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Ario Etienne can be reached on (571) 272-4001. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

March 14, 2006
Uzma Alam
ua

ARIO ETIENNE
PRIMARY EXAMINER